

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANNY FRUITS)	
Claimant)	
VS.)	
)	
NEIL'S FOUNDATION)	Docket No. 233,520
Respondent)	
AND)	
)	
NORTHWESTERN NATIONAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Jon L. Frobish dated November 10, 1998, wherein the Administrative Law Judge granted benefits in the form of medical treatment, ordering claimant's outstanding medical to be paid as authorized medical treatment and requiring respondent to provide a list of three physicians from which claimant could choose one as the ongoing treating physician.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?
- (2) Did claimant provide timely notice pursuant to K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury on March 18, 1998, when, as he was carrying a concrete form weighing approximately 100 pounds, he slipped in the mud. The jarring sensation caused claimant to experience pain in his upper back and neck. Claimant at first thought the pain would go away, but it worsened. Claimant alleges he contacted a representative of respondent named Brian Neil and discussed the injury with him by telephone on March 19, 1998. Phone records were introduced into evidence at the preliminary hearing indicating claimant did make a phone call to respondent's place of

business on March 19, 1998, with the phone call lasting approximately one minute. Claimant alleges a total of three phone calls to Mr. Neil during which he discussed his injury and ongoing symptoms, and the fact that the problems were work-related. Claimant also alleges he had two separate conversations with respondent's secretary and was told to contact "Steve" and discuss insurance and workers' compensation benefits.

Respondent contends the phone calls by claimant were not to provide notice of an injury, but to simply advise respondent that claimant was not coming to work. Neither Steve nor Brian Neil testified in this matter.

Claimant did not seek medical treatment until April 3, 1998. However, claimant did contact respondent on April 2, 1998, requesting that medical treatment be provided for this work-related injury. Claimant's telephone records verify additional calls on March 26, April 2, and April 6, 1998. The March 26 and April 2 phone calls were one minute each with a second April 2 phone call lasting five minutes, and the April 6 phone call lasting four minutes.

Because claimant was not provided an authorized treating physician, he first sought treatment on his own from his chiropractor, Brad J. Swanson, D.C., on April 3, 1998. Both Dr. Swanson's health insurance claim forms and the health insurance claim forms submitted by Gregory A. Ricke, M.D., show claimant's condition as being related to his employment. Dr. Swanson's insurance form of April 10, 1998, indicated claimant injured his neck while carrying a concrete form on March 20, 1998.

Respondent contends that claimant drove home from work with Corey J. Vaden on the date of accident, and failed to mention anything about the injury. In addition, claimant and Mr. Vaden drove two hours to work in a snow storm shortly after the accident, and again claimant failed to mention anything about the injury. Respondent also contends that claimant suffered aggravations from two recent fights where he was punched in the nose, and from a later incident where he fell off a ladder, falling approximately 10 feet and breaking several ribs.

Claimant does not deny the incidents occurred, but does testify that the two fights were after he had already been to the doctor. He was wearing a neck brace at the time he was punched. He also contends that his neck was not aggravated or injured from either of the fights or from the fall off of the ladder.

Both Corey Vaden and Shawn Peterson, coworkers of claimant, testify that they saw claimant drinking on several occasions after the alleged accident, and he did not appear to be in any type of pain. Claimant acknowledges drinking on several occasions, but also claims he was wearing his neck brace at those times. Neither Mr. Vaden nor Mr. Peterson contradict claimant's claim that he was wearing a neck brace at the time he was drinking. Mr. Peterson also testified that claimant discussed the incident with him and the fact that claimant had called respondent on several occasions to report the accident and request

medical treatment. Mr. Peterson was told by claimant that he was supposed to come to respondent's office and discuss the insurance or workers' compensation claims with Steve, but to his knowledge claimant never followed through on those instructions.

Both Mr. Peterson and Mr. Vaden agreed that all accidents were to be reported immediately to their supervisors. When asked how they knew this, they testified that the safety precaution information contained on the employment application discussed the reporting procedures. Claimant denied that there was information on the employment materials requiring notice, but he did acknowledge notifying the respondent was an employment obligation. Claimant contends his phone calls on March 19, March 26 and April 2, 1998, were to notify respondent of the accident and request medical care.

Dr. Ricke diagnosed a large disc herniation at C6-C7 from an MRI performed in June. The MRI was done after the fighting incidents, but before claimant's fall from the ladder, which occurred over Labor Day weekend 1998.

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1997 Supp. 44-501, K.S.A. 1997 Supp. 44-508(g).

Claimant contends accidental injury on March 18, 1998, while carrying a concrete form. He alleges that he contacted his employer by telephone on March 19, 1998, and has telephone records to verify that the call was made. The person to whom the call was allegedly made, claimant's supervisor Mr. Brian Neil, did not testify in this matter. Therefore, the only version of that call available to the Appeals Board is that of claimant. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

As there is no contradicting information, the Appeals Board finds, for preliminary hearing purposes, claimant did notify respondent of the accident by telephone in a timely fashion.

There is also conflicting information regarding whether claimant actually suffered the accident alleged. While claimant alleges a specific onset of pain, he did not bother to tell any of his coworkers, including Corey Vaden with whom he rode to and from work on more than one occasion. He did mention the incident to Shawn Peterson, another coworker, a week to two weeks later, and alleges that he had discussed the incident with respondent on more than one occasion. Medical records from Dr. Swanson, claimant's chiropractor, and Dr. Ricke describe a work-related accidental injury while carrying concrete forms.

While the Appeals Board acknowledges there are some inconsistencies in the record which question claimant's allegations, there is sufficient evidence in the record to

support claimant's version of the accident and a finding that notice was provided to respondent. Therefore, the Appeals Board finds that claimant has proven, for preliminary hearing purposes, that he suffered accidental injury arising out of and in the course of his employment on the date alleged and that timely notice was provided pursuant to K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated November 10, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Ronald J. Laskowski, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director